IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 432 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASARAFKHAN RUSTAMKHAN PATHAN - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR DARSHAN KINARIWALA FOR MR BM GUPTA for Appellant(s) : 1,
MR KT DAVE ADDL.PUBLIC PROSECUTOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date :4/12/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this appeal filed under Section 374 (2) of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 26.4.2002 rendered in Sessions Case No. 299 of 2000 by the learned Additional City Sessions Judge, Court No.9, City Sessions Court, Ahmedabad, by which the appellant ('the accused' for short) has been convicted for commission of the offences punishable under Section 8 (c) read with Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) and sentenced to suffer R.I. for eight years and fine of Rs.50,000/- i.d., R.I. for further period of one year.

2. The prosecution case as unfolded during trial is as follows:

2.1. P.W.3, V.M. Rajvanshi, P.I. State CID Crime Branch (Narcotic Cell), received a secret information on 30.5.2000, at about 8.30 a.m., at

his residence, that a person known as Asrafkhan Rustamkhan Pathan and who, at the relevant time, would be wearing a yellow coloured full sleeve shirt which would have an emblem on the right hand side and olive green pant and also would be wearing black *chappels*, fair skinned, sturdily built with black hair and green coloured eyes between the age of 35 and 40 having height of 5.6 and 5.9 ft., would be carrying on his person about 150-200 grams of narcotic substance and would be coming from Balia Kaka Cross Roads and going towards his residence which was located at Noorbhai Dhobhai's chawl, Gomtipur, Ahmedabad.

2.2. On receipt of the said secret information, it was noted in his personal diary by P.W.3, Rajvanshi and immediately he reached his office at the State Narcotic Cell. Thereafter entry with regard to receipt of the said secret information was made in the register kept and maintained in this regard. The said information was also conveyed in writing to his official

superior in compliance of the provisions contained under the NDPS Act.

2.3. P.W.3, Rajvanshi thereafter made necessary formalities for carrying out the raid. He requisitioned service of two panchas through his police personnel and on arrival of panchas he disclosed the said secret information to the police personnel as well as panchas and prepared the preliminary panchnama and the raiding party thereafter left to the place as described in the secret information. As per the said information, the accused came there who was intercepted and caught hold of by P.W.3, Rajvanshi. The accused was given an option whether he would like to be searched in presence of any other gazetted officer or a magistrate and if he so desired necessary arrangement would be made. The said option was conveyed to the accused in writing as well as orally. But the accused declined to exercise the said option and expressed his willingness to be searched by P.W.3, Rajvanshi.

Thereafter the accused was searched by P.W.3, Rajvanshi and during the search a plastic bag which was greenish in colour was found from the left pocket of his trouser and on being asked about the contents of such plastic bag, the accused disclosed the same to be brown sugar. The said substance was found to be brown in colour and the same was weighed with the aid of the weighing scale brought by the members of the raiding party and the weight of the substance was found to be 154.6 grams. Thereafter some portion of the substance was tested upon by P.W.3, Rajvanshi with the help of the kit box so carried by the members of the raiding party and upon a preliminary test carried out, it was found that the substance so found in the possession of the accused was brown sugar. Thereafter about 5 grams of the substance was segregated from the main bulk of the substance recovered from the accused and the same was properly weighed and put in a plastic bag which was thereafter heat sealed and was wrapped in paper and said packet was

thereafter put in a small plastic container and slip bearing the signatures of the panchas, P.W.3, Rajvanshi as also the accused was put together in the said bag and thereafter the lid of the said container was closed upon which another slip bearing the signatures of the panchas, P.W.3, Rajvanshi as also the accused was affixed and the container was thereafter tied up with string and a seal of PI, NDPS, CID Crime, Gujarat State was applied on such container and the said sample so drawn was earmarked as the sample to be forwarded to the FSL for analysis and was earmarked as Mark A-1. Thereafter another 5 grams was also earmarked as reserve sample and similarly packed and sealed as was done in the case of sample Mark A-1. The said second sampled drawn in this regard was also earmarked and given Mark A-2 and was treated as the reserve sample. The remaining brown sugar which in fact comprised the bulk of the substance so seized was also similarly packed in a plastic bag which was heat sealed and the same was kept in a slightly bigger

container which was also sealed in the same manner as Mark A-1 and Mark A-2. The bulk of the substance was marked as Mark -A.

2.4. As per further case of the prosecution, since residence of the accused was located to the place of the raid, all the members of the raiding party together with the accused went to the residence of the accused and before embarking upon a search of the residence of the accused, a memo prepared as per the provisions contained under Section 42 of the NDPS Act was served on the accused and subsequent thereto the residence of the accused was searched but nothing incriminating was recovered from the residence of the accused. The accused was subsequently arrested and a written arrest memo was served on the accused. Accordingly a detailed panchnama was drawn and signatures of the panchas were obtained thereupon and P.W.3, Rajvanshi also signed on it.

2.5. P.W.3, Rajvanshi, lodged complaint in

respect of the aforesaid incident against the accused at Gandhinagar Zone Police Station for commission of the offences punishable under Section 8 (c) read with Section 21 of the NDPS Act. In compliance of the provisions contained under the NDPS Act, P.W.3, Rajvanshi, informed his official superior, in writing, about the success in carrying out the raid conducted by him.

2.6. Thereafter the investigation was handed over to P.W.4, JB Rana, PSI of State Narcotic Cell. During the course of investigation, J.B. Rana arranged to forward the sample Mark A-1 to the FSL for analysis and recorded statements of the members of the raiding party. On receipt of the report from the FSL certifying that the muddamal sent for analysis was brown sugar and as incriminating evidence was found against the accused, he was charge-sheeted before the City Sessions Court, Ahmedabad for commission of the offences punishable under Section 8 (c) read

with Section 21 of the NDPS Act.

2.7. The learned Additional City Sessions Judge, Court No.9, Ahmedabad, to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Section 8 (c) read with Section 21 of the NDPS Act which was read over and explained to him. As the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial and tried in Sessions Case No. 299 of 2000.

2.8. To prove the culpability of the accused, the prosecution has examined and relied upon the evidence of 5 witnesses, the details of which are given in para 7 of the impugned judgment and order. They are as under:

P.W. No.	Details	Ex. No.
1.	Karsanbhai Khodabhai Parmar (Panch witness)	13

P.W. No.	Details	Ex. No.
2.	Ikbal Hussain Kasim Shaikh (Panch witness)	15
3.	V.M. Rajvanshi, P.I. (complainant)	16
4.	Jasubhai B. Rana, PSI (I.O.)	42
5.	Manubhai K. Gadhvi (carrier of the sample to the FSL	50

2.9. To prove the case against the accused, the prosecution also produced and relied upon a number of documents, details of which are mentioned in paragraph 8 of the impugned judgment and order.

2.10. After recording of the evidence of the prosecution witnesses was over, the learned Judge of the trial Court explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution in toto. He, however, did not lead any evidence nor did he examine any witness in

support of his defence. In his further statement, he has, however, reiterated that he has been wrongly roped in a false case. He has stated that the police personnel asked him whether he was 'Pathan' and on replying in the affirmative he has been forcibly pushed into the car and took him to Gandhinagar and arrested there after giving arrest memo and seizure memo by obtaining his signature forcibly on the same. In sum and substance, the defence of the accused was that he has been wrongly roped in a false case.

2.11. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Judge of the trial court held that the accused has been found guilty of the offence punishable under Section 8 (c) read with Section 21 of the NDPS Act on being found in conscious possession of 154.6 grams of brown sugar. He, therefore, sentenced the accused to undergo RI for ten years and fine of Rs.1 lakh i.d., RI for further period

of two years, vide judgment and order dated 5.11.2001.

2.12. Being aggrieved by the said judgment and order of conviction and sentence, the accused filed Criminal Appeal No.79 of 2002 before this Court which was listed for final hearing before a Division Bench consisting of J.M. Panchal & J.R. Vora, JJ., and the Division Bench vide judgment and order dated 25.2.2002 allowed the appeal by holding that the decision, on merits, at that stage, was not challenged by the learned counsel for the accused and, therefore, the findings recorded by the learned Judge on merits were not interfered with at all at that stage. The matter was remanded to the learned Judge with a direction that he shall consider the aspect of the imposition of punishment in light of amended provisions of Section 21 of the NDPS Act and the circumstances which might be pointed out by the accused regarding imposition of sentence on him. It was clarified that after the fresh order was

passed by the learned Judge of the trial court, imposing punishment, it would be open to the accused to challenge the legality of the judgment, including merits of the case, before the appropriate forum and a direction was also issued that the accused shall be heard regarding imposition of sentence by the learned Judge as early as possible and without any voidable delay. The appeal was accordingly allowed.

2.13. Pursuant to the order passed by the Division Bench of this Court in Criminal Appeal No.79 of 2002 on 25.2.2002, the learned Judge of the trial court heard the accused on the question of sentence in light of the amended provisions of Section 21 of the NDPS Act and after hearing the learned advocates appearing of the parties, the learned Judge of the trial Court has modified the quantum of punishment by reducing the RI to 8 years instead of 10 years and the fine amount has also been reduced from Rs.1 lakh to Rs.50,000/- and in default of payment of fine, the accused

was ordered to undergo RI for a further period of one year instead of RI for two years, which has given rise to instant appeal at the instance of the accused.

3. Mr. Darshan Kinariwala, learned advocate of the accused, has submitted that he does not challenge the impugned judgment and order so far as the conviction recorded by the learned Judge of the trial court against the accused is concerned. However, he has submitted that the quantum of sentence of RI for 8 years and fine of Rs.50,000/- imposed upon the accused is a little bit harsh looking to the quantity of the contraband article recovered from the accused which was of 154.6 grams. According to him, as per the latest notification issued under the NDPS Act, so far as brown sugar is concerned, quantity of 5 grams is considered to be small quantity whereas 250 grams is considered to be commercial quantity. The chemical name of the contraband article 'brown sugar' recovered from the accused

is heroin. In view of the amended provisions of the NDPS Act, for possessing less than commercial quantity punishment prescribed is RI upto ten years and there is no minimum sentence prescribed. Since the minimum sentence prescribed for possessing commercial quantity is RI for ten years, for possessing less than the commercial quantity, sentence of RI for 8 years and fine of Rs.50,000 is a little bit harsh and deserves to be reduced. He, therefore, submitted that the sentence of RI for 8 years and fine of Rs.50,000/- imposed on the accused may be modified by imposing sentence of the period of imprisonment already undergone by the accused as substantive sentence. The accused is in jail since his arrest i.e., 30.5.2000. Therefore, by now he has undergone imprisonment for more than six years and taking a liberal and lenient view, the sentence may be modified by imposing the period of imprisonment undergone by the accused so far may be treated as substantive sentence and thereby the appeal may be allowed accordingly.

4. Per contra, Mr. K.T. Dave, learned Additional P.P., has submitted that sentence of RI for 8 years and fine of Rs.50,000 imposed on the accused by the learned Judge of the trial Court is proportionate to the guilt of the accused as the accused was found with brown sugar weighing 154.6 grams and, therefore, no lenient view may be taken by this Court. He, therefore, urged to dismiss the appeal as it has no merit.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read an re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Supreme court while dealing with NDPS cases, this court has examined

the entire evidence on record for itself independently of the learned Judge of the trial Court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the learned Judge of the trial Court has rightly recorded the order of conviction and sentence.

6. There is no manner of doubt that a person indulging in the business of narcotic drugs is a menace to the society. He not only breaks the economy of the country but also substantially causes damage to the youth of the country and also deteriorates their health and, therefore, they become useless for society and the country. Therefore, to combat illicit drug traffic and drug abuse, both at the national and international levels, stringent punishment is provided under the NDPS Act. However, the parliament in its wisdom thought it fit that there should be rationalized sentencing structure

depending upon the quantity of the contraband article i.e., narcotic substance recovered from the accused and, therefore, the parliament has enacted Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001. Section 41 (1) of the Amending Act reads as under:

> “41.(1) Notwithstanding anything contained in sub-section (2) of section 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence :

Provided that nothing in this section shall apply to cases pending in Appeal."

7. The Ministry of Finance (Department of Revenue) has issued Notification dated September 27, 2001 in exercise of the powers conferred by sub-section (2) of Section 1 of the NDPS (Amendment) Act, 2001 appointing October 2, 2001 as the date on which the said Act has come into force in the whole of India. In the present case, the trial against the appellant had concluded on November 05, 2001 but before that date the Amending Act had come into force and, therefore, in view of the provisions of Section 41 of the Amending Act, there is no manner of doubt that the case of the appellant ought to have been disposed of in accordance with the provisions of the Principal Act as amended by the Amending Act and the question of punishment ought to have been considered in the light of provisions of the Amending Act. Section 21 after the new Amendment is as under :

"21. Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable --

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

8. In exercise of the powers conferred by the clauses (viia) and (xxiiia) of Section-2 of the NDPS Act, 1985 and in supersession of Ministry of Finance, Department of Revenue Notification SO 527(E) dated 16th July, 1996, the Central Government has, by a Notification S.O.1055(E) dated October 19, 2001, specified the quantity mentioned in columns 5 and 6 of the Table prescribed below it, in relation to the

narcotic drug or psychotropic substance mentioned in the corresponding entry in columns 2 to 4 of the said Table, as the small quantity and commercial quantity respectively for the purpose of the said clauses of that Section. As per the table, so far as Heroin is concerned, the small quantity specified is 5 grams whereas commercial quantity specified is 250 grams. There is no manner of doubt that what was found from the possession of the appellant was 154.6 grams of Brown Sugar and the contravention involves quantity, lesser than commercial quantity but greater than small quantity. Therefore, the rigorous imprisonment could have extended to 10 years and with fine which could have extended to Rs. 1 lac.

9. In instant case, the learned Judge of the trial Court, after hearing the accused and the learned advocates appearing for the parties, imposed sentence of R.I. for 8 years and fine of Rs.50,000 i.e., R.I. for further period of one year.

10. In the case of Balwinder Singh v. Assistant Commissioner, Customs and Central Excise, (2005) 4 SCC 146 the Supreme court has narrated the relevant factors to be considered for reduction of sentence for the offence under the NDPS Act. In the said case the accused was convicted of the offence under the NDPS Act for the first time and, therefore, sentence was reduced from 14 years to ten years.

11. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts of the present case and also in light of the aforesaid statutory provisions contained under the NDPS (Amendment) Act, 2001, since the accused was found in possession of contraband article 'brown sugar' weighing 154.6 grams which is less than the commercial quantity (approximately 100 grams lesser than the commercial quantity, which is 250 grams) and also considering the fact that this is the first

offence in which the accused is involved, looking to his young age and also the fact that he appears to be the sole earning member of the family which consists of his wife and children, we are of the opinion that the sentence of R.I. for 8 years and fine of Rs.50,000 imposed on the accused by the learned Judge of the trial Court is required to be modified by reducing it to RI for 6 years instead of RI for 8 years as imposed by the learned Judge of the trial Court and also by reducing the amount of fine to Rs.25,000/- instead of Rs.50,000/- as imposed by the learned Judge of the rial Court and in default of payment of fine, the accused shall undergo RI for a further period of six months.

12. Seen in the above context, while confirming and maintaining the conviction of the accused for commission of the offence under section 8 (c) read with section 21 of the NDPS Act, this appeal deserves to be allowed qua sentence only.

13. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. While upholding the order of conviction recorded by the learned Judge of the trial Court against the accused for commission of the offence punishable under Section 8 (c) read with Section 21 of the NDPS Act, we modify the sentence by reducing it to R.I. for 6 years instead of R.I. for 8 years as imposed by the learned Judge of the trial Court and also reduce the amount of fine to Rs.25,000/- instead of Rs.50,000/- as imposed by the learned Judge of the trial Court and i.d., the accused shall undergo R.I. for further period of six months.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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